



Comptroller General  
of the United States

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Washington, D.C. 20548

## Decision

**Matter of:** Wesley Medical Resources, Inc.

**File:** B-257677

**Date:** August 17, 1994

Bruce Lymburn, Esq., Proskauer Rose Goetz & Mendelsohn, for the protester.  
Riggs L. Wilks, Jr., Esq. and Charles R. Marvin, Jr., Esq., Department of the Army, for the agency.  
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest that contracting agency improperly failed to require offerors to recertify small business size status after amendment of solicitation, pursuant to 13 C.F.R. § 121.904(c) (1994), and that as a result Small Business Administration (SBA) based size determination on incorrect information, i.e., the wrong 3-year period for considering annual receipts, is dismissed; protest ultimately involves issue of which size status information should be considered by SBA, a matter within SBA's exclusive statutory authority to determine small business status.

### DECISION

Wesley Medical Resources, Inc. protests the award of a contract to Med Staff, Inc. under solicitation No. DADA10-93-R-0058, issued by the Department of the Army for medical/surgical nursing services at Brooke Army Medical Center, Fort Sam Houston, Texas. Wesley alleges that Med Staff improperly failed to recertify its status as a small business at the time it responded to the amended solicitation and that, as a result, the Small Business Administration's (SBA) size determination, relied upon in making award, was based on incorrect information.

We dismiss the protest.

The solicitation was issued as a total small business set-aside. The agency received initial offers on October 5, 1993. The solicitation was amended (amendment No. 0005) on

January 31, 1994,<sup>1</sup> and revised offers were due by February 15, 1994. After being notified on May 17 of the Army's proposed award to Med Staff, on May 20 Wesley filed a protest with the Army concerning Med Staff's size; the contracting officer forwarded the protest to the appropriate SBA Regional Office. See 13 C.F.R. §§ 121.1601 and 121.1603 (1994). On June 7 SBA determined that Med Staff was a small business, and on June 9 the Army awarded the contract to Med Staff.

Wesley received notice of SBA's determination on June 16, and on June 22 appealed it to SBA's Office of Hearings and Appeals. See 13 C.F.R. § 121.1701 et seq. The basis for the appeal was that SBA relied on incorrect information in making its size determination of Med Staff. Wesley argued that because Med Staff failed to recertify its status as a small business in 1994, at the time it submitted its response to the amendment, SBA erroneously based its size determination on the years 1990, 1991, and 1992, instead of 1991, 1992, and 1993. See 13 C.F.R. §§ 121.402 and 121.904 (size status is determined based on examination of average annual receipts during 3 years preceding date of self-certification).

On June 22, Wesley filed this protest with our Office, essentially based on the same argument. Wesley cites SBA's regulations which provide that "[w]here a solicitation is modified so that initial offers are no longer responsive to the solicitation, the concern must recertify that it is a small business at the time it submits a responsive offer which includes price to the modified solicitation." 13 C.F.R. § 121.904(a) and (c). Wesley maintains that Med Staff should have been required to recertify its small business status at the time the firm submitted its response to the amended solicitation; the absence of this recertification resulted in an erroneous SBA size determination and, ultimately, an improper award.

Wesley's protest essentially involves the issue of whether SBA based its size determination on the proper information. Under the Small Business Act, 15 U.S.C. § 637(b)(6) (1988), SBA has conclusive authority to determine matters of size status for federal procurement purposes; we will not review

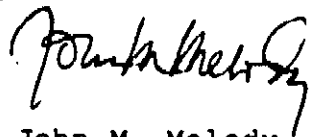
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<sup>1</sup>Amendment No. 0005 changed the performance start date from December 1, 1993, to May 1, 1994, and revised the number of hours in the base year accordingly. It also added a requirement for a local security check (criminal history) on nursing personnel. In her cover letter to the amendment, the contracting officer requested that offerors respond by acknowledging receipt of the amendment and address how they would comply with the requirement.

protests of such matters. 4 C.F.R. § 21.3(m)(2) (1994); see Research Analysis & Maintenance, Inc.--Recon., B-242107.2, Mar. 13, 1991, 91-1 CPD ¶ 281; Independent Metal Strap Co., Inc., B-240033.3, Dec. 12, 1990, 90-2 CPD ¶ 481. The question of which information must be considered by SBA in making a size determination is inextricably linked to the size determination itself, since the information relied upon ordinarily will dictate the nature of the determination. Thus, SBA's authority, to be conclusive, must encompass the determination of which information is to be considered. Accordingly, this matter, like the size determination itself, is not for our consideration. (Moreover, in this case, SBA will consider this issue in deciding Wesley's appeal of SBA's initial determination of Med Staff's size.)

Alternatively, the protester contends that the Army awarded the contract without awaiting the firm's appeal of SBA's determination that Med Staff qualified as a small business for purposes of this solicitation. While the regulations provide for an appeal from an initial SBA size determination, however, there is no requirement that the contracting officer withhold award during the appeal period. See Federal Acquisition Regulation (FAR) § 19.302(i).

The protest is dismissed.



John M. Melody  
Assistant General Counsel